

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL WEATHER,

08 CIV 0192 (RPP) (LMS)

Plaintiff.

-against-

JOINT PRETRIAL ORDER

THE CITY OF MOUNT VERNON¹ and SERGEANT
MICHAEL MARCUCILLI in his individual and official
capacity,

Defendants.

The parties to this action, through the undersigned, their respective attorneys, make this statement for use at the pretrial conference to be conducted in this action.

Counsel

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Subject Matter Jurisdiction

This action is brought pursuant to 42 U.S.C. §1983 and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §1331 and §1333(3) and (4) and the aforementioned statutory and constitutional provisions.

¹ There are no claims against the City of Mount Vernon as Plaintiff has withdrawn the Monell Claim.

Plaintiff's Claims & Defenses

Excessive Force under 42 U.S.C. §1983 as a violation of the Fourth Amendment of the United States Constitution.

Plaintiff claims that Michael Marcucilli without cause shoved plaintiff against a wall causing injury to his left shoulder, right clavicle and aggravating injuries to right shoulder, neck, and lower back.

Defendant's Contentions

Plaintiff's constitutional rights were not violated on January 12, 2007 at a high school basketball game filled beyond capacity. Crowd Control is a legitimate governmental function exercised by the police department. In re Ashley M. 30 A.D.3d 178, 180, 817 N.Y.S.2d 15, 17 (1st Dept.2006) *citing Flynn v. City of New York*, 258 A.D.2d 129, 693 N.Y.S.2d 569 (1999).

Plaintiff attempted to re-enter the gymnasium without identification; and when police officers asked him for same, he refused to comply, creating a scene amidst a crowd of people. As such, Sgt. Marcucilli's actions, in escorting plaintiff away from the crowd, were objectively reasonable under the circumstances and he is entitled to qualified immunity as defined by Graham v. Connor. 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed2d 443 (1989). Excessive force was not used by Sergeant Marcucilli. Plaintiff's Notice of Claim states that Police Officer "grabbed Claimant and twisted his arm behind his back". There are no other factual allegations regarding the use of force contained in either the Notice of Claim or the Complaint.

As the Officer's actions were reasonable, we will be seeking a dismissal of plaintiff's complaint as a matter of law.

Trial

This case is to be tried without a jury. Plaintiff expects his proof to take two (2) days.

Judge

The parties have not consented to trial of the case by a magistrate judge.

Agreed Statement of Facts

On January 12, 2007, at approximately 5:15P.M., Plaintiff was present at a basketball game at Mount Vernon High School where Mount Vernon Police Department provided security. Mount Vernon High School is located at 100 California Road, Mount Vernon, in the County of Westchester, State of New York. Plaintiff and Sgt. Marcucilli had an exchange. At all times, Defendant Sergeant Michael Marcucilli was employed by Defendant City of Mount Vernon, and at all times was acting in his official capacity.

Plaintiff's Witnesses

Paul Weather – *In person*
133 So. 10th Avenue
Mount Vernon, New York 10550

Janee Weather – *In person*
133 So. 10th Avenue
Mount Vernon, New York 10550

James Young – *In person*
65 East 99th Street - #12E
New York, New York 10029

Robert Pegues – *In person*
33 North Third Avenue
Mount Vernon, New York 10550

Sergai N. Delamora, M.D. – *In person*
Scarsdale Orthopedic Associates
2 Overhill Road
Scarsdale, New York 10583

Satish R. Modugo, M.D. – *In person*
Sports Spine & Pain Treatment Center of Westchester
220 North Central Avenue
Hartsdale, New York 10530

Lisa Rhodes, Police Officer – *In person & Deposition*
Mount Vernon Police Department
2 Roosevelt Square, North
Mount Vernon, New York 10550

Defendant's Witnesses (all in person)

Deputy Chief John Roland
Sgt. Michael Marcucilli
Police Officer Alissa Rhodes
Police Officer Robert Budde
Police Officer Denis Kelly

Deposition Testimony

Michael Marcucilli, Sergeant of Mount Vernon Police Department deposed on February 9, 2010.

Lisa Rhodes, Police Officer of Mount Vernon Police Department deposed on July 23, 2010.

Plaintiff's Exhibits

MRI from Hartsdale Imaging dated 01/19/07 of Left Shoulder ☆☆
MRI from Hartsdale Imaging dated 01/22/07 of Right Shoulder ☆☆
MRI from Hartsdale Imaging dated 04/15/09 of Left Shoulder ☆☆
Sound Shore Medical Center Records dated 01/12/07 ☆☆

Defendant's Exhibits

EXHIBITS "A" – "J" Police Department Reports Exchanged on January 29, 2010

A) Intradepartmental Memorandum from Lt. Manzione to Capt Kelly
Bates Stamp 000001-000006

B) Intradepartmental Memorandum from Sgt. Marcucilli to Lt. Manzione
Bates Stamp 000007

C) Assignment Sheet
Bates Stamp 000008

D) Memobook Entry of Sgt. Marcucilli
Bates Stamp 000009-00010

E) MV 5 Officer's Report of Officer Aristotle Evans
Bates Stamp 0000011-0000012

F) MV 5 Officer's Report of Officer McClendon
Bates Stamp 0000013

G) MV 5 Officer's Report of Officer Ortiz
Bates Stamp 0000014-000015

H) MV 5 Officers Report of Detective Rhodes
Bates Stamp 0000016-000017

I) MV 5 Officer's Report of R. Budde
Bates Stamp 0000018

J) MV 5 Officer's Report of Denis Kelly
Bates Stamp 0000019-0000020

EXHIBIT "K"

Plaintiff's Disability File ☆☆

EXHIBIT "L"

Lawrence Hospital Records dated November 17, 2006 ☆☆

EXHIBIT "M"

Dr. Martin Barschi's Independant Medical Exam of Plaintiff on
December 20, 2010 ☆☆

Exhibit "N"

Journal News Articles from 2007 ☆☆

Deposition Transcripts

Plaintiff's 50-H - July 12, 2007

Plaintiff's Examination Before Trial (EBT) - December 1, 2009

Dated: February 4, 2011
White Plains, New York

Respectfully submitted,

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